

Supreme Court of the United States

OCTOBER TERM, 1912

**J. F. LAY, ADMINISTRATOR OF THE ESTATE OF R. G. LAY, DECD.,
AND EXECUTOR, LAST WILL AND TESTA-
MENT OF JAS. G. LAY, DECD., ET AL.,**

Plaintiffs in Error,

vs.

**R. G. LAY, ADMINISTRATOR OF THE ESTATE OF HARRY LAY, DECD.,
ET AL.,**

Defendants in Error.

EXPL. BRIEF FOR DEFENDANTS IN ERROR.

W. H. WATKINS,
Attorney for Defendants in Error, on Motion.

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IN THE

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**J. F. LAY, ADMR., ESTATE OF R. M. LAY, DEC'D,
AND EXECUTOR, LAST WILL AND TESTA-
MENT OF JAS. G. LAY, DEC'D, ET AL.,**

Plaintiffs in Error.

vs. No.....

**R. C. LAY, ADMR. ESTATE NANCY LAY, DEC'D,
ET AL.,**

Defendants in Error.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

POINT I.

In our original brief under Point I, we announced the following rule:

“Right, privilege or immunity asserted by plaintiffs in error under Section 3477, not presented because no writ of certiorari obtained.”

We cited the case of Philadelphia & Reading Coal & Mining Co. v. Gilbert, 245 U. S. Rep. 162.

We beg to direct the attention of the Court to the following additional authorities directly in point: Northern Pacific Railway Co. v. Solum, Advance Sheets, No. 16, dated July 15th, 1918, p. 677; Stadelman v. Miner, Advance Sheets No. 12, dated May 15th, 1918, p. 430, 246 U. S. p. 311; Ireland v. Woods, Commissioner, 246 U. S. p. 323, wherein following language was used:

“When, however, the conditions are reversed, that is, when state court judgments affirm the national powers against a contention of their invalidity or do not sustain the validity of the state authority against an attack based on federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up. The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the Court's discretion.”

The position of counsel for plaintiffs in error as we understand it from the argument contained in brief, amounts to the statement that the writ of error brought up the entire record and this Court should review every federal question decided by the State Supreme Court and assigned for error here irrespective of whether the question is one which under Section 237 of the Judicial Code

should be brought to this Court by writ of error or certiorari. It must be borne in mind that the decree rendered by the Supreme Court of the State of Mississippi which the plaintiffs in error seek to have reviewed on this appeal, is a separable decree involving distinct propositions of law as to which some of the litigants are not at all interested. In other words, there is first presented the question as to the distribution of the fund arising from the estate of Nancy Lay, deceased; it being the contention of the plaintiffs in error that they take the entire fund; that the defendants in error have no interest therein whatsoever; that any claim which they may assert in respect to such fund is void under Section 3477 of the Revised Statutes of the United States.

This question involves a controversy existing only between the plaintiffs in error and the heirs at law or personal representatives of R. M. Lay; the other defendants in error Messrs. King & King being absolutely not interested, either directly or indirectly, in the determination of the question. The next question presented by the record and decided by the Supreme Court of the State of Mississippi, was as to the validity of the Act of Congress limiting attorneys' fees, in making appropriation to pay Civil War claims, to 20% of the amount collected. In respect to this controversy, we find the owners of the fund, wherever they may be, whether heirs of Nancy Lay or heirs and personal representatives of R. M. Lay, arrayed upon one side and Messrs. King & King, attorneys, upon the other.

The Supreme Court of the State of Mississippi decided (1) That the claim asserted by the heirs and personal representatives of R. M. Lay to the fund in question was not affected by section 3477 of the United States Revised Statute and that such statute had no application thereto; that the question presented was one of distribution arising in the administration for the estate of Nancy Lay, deceased, as to which the chancery court

of Scott County, Mississippi had full, complete and ample jurisdiction involving only questions of local law.

(2) That the Act of Congress limiting attorneys fees to 20% of the amount collected, was invalid and unenforceable. It is therefore perfectly apparent that the decree appealed from involves two distinct and separable propositions of federal law. One involving the assertion of a right, privilege or immunity under a Federal statute or authority; the other involving the validity of a federal statute. In the first instance the decision of the Supreme Court of the State of Mississippi was against the right, privilege or immunity asserted by plaintiffs in error. In the second instance, the decision of the same Court was against the validity of the Federal statute limiting attorneys fees to 20% of the amount recovered. These legal propositions, the first involving the question of a right, privilege or immunity asserted under a Federal statute or authority, the other the validity of a Federal statute, while presented in a single decree, are as separate and distinct as if arising under separate and distinct decrees of the court. Therefore under section 237 of the Judicial Code of the United States as amended in 1916, if the plaintiffs in error desired to bring up before this Court for review the right, claim or immunity involved in their assertion that all claim of the heirs and personal representatives of R. M. Lay, under section 3477 of the revised statutes, was void and conferred no kind of right, claim or title on the heirs and personal representatives of R. M. Lay, it was their duty to obtain from this Court a writ of certiorari; otherwise the question is not properly presented and this Court has acquired no jurisdiction thereof.

It would be well at this point to differentiate the cases cited by opposing counsel claimed to be in support of their theory of this case. The case of Crescent City Live Stock Landing & Slaughter House Co. v. Butchers'

Union Slaughter House & Live Stock Landing Co., 120 U. S. 141, 30th L. Ed. 614.

This case is utterly irrelevant to the present discussion. The case was decided in 1887, long before the passage of the present section of the judicial code forming the subject of this controversy. At that time writ of error was the proper method of bringing the case to this Court. The case is merely an authority for the proposition that the assertion of a right under a judgment or decree of the district court of the United States where the decision was adverse to the right claimed, presented a Federal question reviewable by this Court.

The same may be said of the case of Cumberland Glass Mfg. Co. v. Chas. DeWitt 237 U. S. 447, 59 L. Ed. 1042.

The case of *Home for Incurables v. City of New York* 187 U. S. 155, throws no light upon this controversy. In that case this Court was discussing the means by which it ascertained whether or not the record presented for decision a federal question by the state court, and this Court said that if the State Supreme Court assumed to pass upon a federal question, it would look no further but would assume that a federal question was actually decided by the Supreme Court of the State. In this case, however, we do not deny that two separate federal questions were decided by the Supreme Court of the State of Mississippi, both of which could be reviewed by this Court provided their review was presented to this Court by such procedure as would enable it to acquire jurisdiction thereof. In the present instance counsel for the plaintiffs in error have never presented to this Court, in the only manner by which it can review the same, the question of the right privilege or immunity claimed by them under section 3477 of the United States Revised Statutes. By the provisions of the statute plain-

tiffs in error assert that the heirs at law of Nancy Lay, and not the heirs at law of R. M. Lay, acquired the fund in question. The plaintiffs in error have caused to be properly presented to this Court the federal question decided by the Supreme Court of the State of Mississippi in respect to the validity of the statute limiting attorneys' fees. We will hereafter show the court that question presented by the writ of error does not present the other federal question which can only be presented by certiorari; and besides, as we shall hereafter demonstrate to the court, the question of constitutionality of attorneys fees provision in the Act of Congress making appropriation for the payment of war claims, is not now, and was not, a live substantial question but merely a **moot** question as to which this Court could grant plaintiffs in error no relief even if its decision as to such question should be in their favor.

The plaintiffs in error concede that the decree rendered by the Supreme Court of the State of Mississippi, presents two separate and distinct Federal questions. The one arising out of the right to the entire fund in question asserted by plaintiffs in error as against the heirs at law of R. M. Lay, which was decided adversely to them, and the other growing out of the decision of the Supreme Court of Mississippi holding the attorneys fee statute unconstitutional.

Counsel for plaintiffs in error further concede that no writ of certiorari was obtained from this Court in respect to this record. In support of their position that the writ of error obtained brings up for decision not only the question of validity of that provision in the Act of appropriation passed by Congress limiting attorneys' fees to 20% of the amount recovered, but also brings up for review any and every other Federal question decided by the Supreme Court of Mississippi, plaintiffs in error cite the case of McGowan v. Parish 237 U. S. 285, 59 L.

Ed. 955. That case, as well as the others therein cited, announce the rule that where an appeal is taken from the Supreme Court of the District of Columbia to the Supreme Court of the United States, that if one of the questions contained in the record confers upon this Court jurisdiction to review the record, then this Court should consider every question presented by the record, although it may not be necessary to decide the actual question assigned for review as the basis for the Court's jurisdiction provided such question is a substantial, live question in this Court.

A different rule obtains in respect to appeals from the Supreme Court of a state to this Court.

A somewhat similar question was presented to this Court for review many years ago in the case of *Thomas Murdock v. Mayor and Aldermen of Memphis*, 20 Wall, 590, 22 L. Ed. 429. In that case it was contended on appeal that if one or more Federal questions were properly presented to this Court, that this Court could then review the entire record and proceed to decide every point in the case whether the question involved was a Federal question or not. In other words, it was contended that this Court could take general jurisdiction of the case and decide even common law questions. This Court held otherwise, using the following language:

“Let us look for a moment into the effect of the proposition contended for upon the cases as they come up for consideration in the conference room. If it is found that no such question is raised or decided in the court below, then all will concede that it must be dismissed for want of jurisdiction. But if it is found that the federal question was raised and was decided against the plaintiff in error, then the first duty of the court obviously is to determine whether it was correct-

ly decided by the State Court. Let us suppose that we find that the court below was right in its decision on that question. What, then, are we to do? Was it the intention of Congress to say that "While you can only bring the case here on account of this question, yet when it is here, though it may turn out that the plaintiff in error was wrong on that question, and the judgment of the court below was right, though he has wrongfully dragged the defendant into this Court by the allegation of an error which did not exist, and without which the case could not rightfully be here, he can still insist on an inquiry into all the other matters which were litigated in the case?" This is neither reasonable nor just.

"In such case both the nature of the jurisdiction conferred and the nature and fitness of things demand that, no error being found in the matter which authorized the re-examination, the judgment of the State Court should be affirmed, and the case remitted to that Court for its further enforcement.

"The whole argument we are combating, however, goes upon the assumption that when it is found that the record shows that one of the questions mentioned has been decided against the claim of the plaintiff in error this Court has jurisdiction, and that jurisdiction extends to the whole case. If it extends to the whole case then the court must re-examine the whole case, and if it re-examines it must decide the whole case. It is difficult to escape the logic of the argument if the first premise be conceded. But it is here the error lies. We are of opinion that upon a fair construction of the whole language of the section the jurisdiction conferred is limited to the decision of the questions mentioned in the statute and, as a necessary consequence of this, to the exercise of

such powers as may be necessary to cause the judgment in that decision to be respected.”

We therefore find that at an early day as to appeals from the Supreme Court of a State to this Court, it was decided that the rule announced in *McGowan v. Parish* was inapplicable. The question, however, needs no other discussion than the statute itself. Section 237 of the Judicial Code as amended is the only authority by which an appeal can be taken from a State Court to this Court. An appeal is not a matter of right; it is a matter of grace with the sovereign power. The statute is highly technical and provides the only means by which an aggrieved litigant can remove his cause from a state court to this Court; and not only that, but it provides the only circumstances and the sole method of procedure by which this Court could acquire jurisdiction over an appeal from a State Court.

The section in question provides in substance that if the decision of a state court shall be against the validity of a statute, treaty or authority of the United States, that this Court shall review such decision or decree by writ of error.

The same statute provides that in the event any right, privilege or immunity shall be asserted under any statute or authority of the United States, and the decree of the state court shall be either for or against such right or claim, the same shall be reviewed by this Court by writ of certiorari.

When the statute says that certain questions arising under decrees of state courts shall be reviewed by this Court under certain circumstances and by prescribed procedure, the provisions are equal to the declaration that such decrees shall be reviewed under no other circumstances and only by the procedure provided therein.

These conclusions necessarily arise by giving due effect to the argument that the statute is the source of the right to appeal and must be strictly complied with.

The statute in effect says that this Court shall not review a question involving the validity of a United States statute or authority where the decree of the state court is against the validity thereof except by writ of error. The statute is equally as mandatory in its provisions that where the decree of the state court is either for or against a right, privilege or immunity asserted under a United States statute or authority that this Court shall only have jurisdiction to review the same by writ of certiorari.

The distinction grows out of the essential difference in the two methods of procedure, as has been made so clear by the adjudications of this Court.

A writ of error is granted as a matter of right where a decree of a state court presents any one of the statutory federal questions. While upon the other hand a writ of certiorari is discretionary with this Court. An examination of the statute will show that this classification by Congress as to the federal questions which should be reviewed by writ of error and by certiorari is not arbitrary but based upon distinctions which are fundamentally wise and just.

If a state court should declare unconstitutional a federal statute, or declare invalid any federal authority, the aggrieved litigant should as a matter of right and common justice be permitted to obtain a review of such decree by this Court, and Congress therefore provided a very simple method of procedure for securing the review of such questions by this Court making the right absolute. Upon the other hand, in cases where the state court passes upon the validity of a federal statute or au-

thority, and the decision is in favor of such authority, or in cases where the decree deals with a right, privilege or immunity asserted under a federal statute or authority, there is much more likelihood of appeals being taken to this Court where the questions involved are frivolous and the denial of the right of review be attended with no injustice. In such cases Congress has with great wisdom left the question of reviewing such decrees of state courts to the discretion of this Court by providing for the issuance of a writ of certiorari by this Court for the purpose of bringing the decree of the state court before it for review. Which means that in all cases required to be brought before this Court by certiorari the applicant will be required not only by proper procedure to show that a federal question of the nature now under discussion was presented and actually necessary to the decision of the court, but that such question is of such importance as to justify a review by this Court. In other words, it must be made to appear not only that the Federal question was presented and necessary to a decision, but it must be made to appear to this Court that the state court was probably wrong in its decision of the federal question.

The position of counsel for the plaintiffs in error is in contravention of the direct and unambiguous provisions of the statute as construed by this Court. Congress doubtless had weighty reasons for limiting the jurisdiction of this Court to review certain federal questions except in accordance with the methods of procedure therein provided. Counsel for plaintiffs in error would set these reasons at nought and make it the duty of this Court on writ of error to take jurisdiction of, review and pass on other questions in the record which Congress has enacted should not be considered by this Court except in accordance with the statutory procedure. This position would write an exception into the statute. It would substitute writ of error for certiorari. Whereas Congress has left no room for substitution. Counsel for

plaintiffs in error seek to answer the argument by making inquiry as to whether or not in order to review before this Court a single decree of a state court where such decree is against the validity of the federal statute, and in addition thereto either decides in favor of or against a right, privilege or immunity asserted under a federal statute or authority as to whether it would be necessary to obtain both a writ of error and certiorari. The answer to the inquiry is obvious. If the litigant should desire both questions to be reviewed by this Court it would be necessary to resort to the statutory procedure for certifying each of the questions to this Court. The answer to the inquiry however, is found in the plain and unambiguous language of the statute itself. The statute says in substance that any decree of a state court which is against the validity of a federal statute or authority may be reviewed by writ of error. The statute further in substance says that the decree of any state court either for or against any right or immunity asserted under any federal statute or authority may be reviewed only by this Court on writ of certiorari and then only within the discretion of the Court.

The language "any judgment or decree" in the first provision of the statute requiring decisions against the validity of the statute to be brought before this Court for review by writ of error, necessarily refers to the same decree if such decree also adjudicates a right or immunity under a federal statute in the second paragraph thereof. In other words the different methods for reviewing the decree of a state court provided in the statute do not deal with the decree in its entirety but deal with the essentially different federal questions which may be presented in the same decree. That is to say, a provision in a decree against the validity of a federal statute or authority must be brought up by writ of error although the same decree may contain an adjudication for or

against a right, claim or privilege asserted under a federal statute or authority.

Congress intended to provide a definite method of procedure for bringing different federal questions before this Court. It being immaterial whether the different questions are to be found in one or several decrees. The statute nowhere says that the adjudication contained in the decree of a state court for or against the assertion of a right, claim or immunity under a federal statute or authority may be reviewed by this Court on writ of error, provided the same decree adjudicates some federal question reviewable by writ of error. Let the statute be its own construer. It was within the province of Congress to provide the procedure necessary in order to review by this Court judgments and decrees of state courts. Congress has acted in the matter; it has left nothing to doubt, nothing to speculation. It has provided that this Court shall review certain federal questions by writ of error; that the review of certain other federal questions from state courts on the part of this Court is discretionary. It is only necessary in this case to follow the plain mandates of the statute without adding to or taking anything from it. To adopt the construction contended for by counsel for plaintiffs in error would compel this Court on writ of error merely, and make it the absolute duty of the Court, to review a federal question decided by a state court the consideration of which has been made discretionary on the part of this Court by Congress. Such construction is in direct conflict with the plain provisions of the statute.

The question presented by the writ of error in respect to the validity of the attorney's fee clause in act of Congress is not and was not a substantial live question in this Court.

In the case of *Ireland v. Woods, Commissioner, supra*,

speaking of the essential nature of a federal question in order that the same may be reviewed by this Court, it was said:

“The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the Court’s discretion.”

It is the contention of plaintiffs in error that although the question of the applicability of section 3477 of the revised statute of the United States being that federal question in the record which could only have been brought to this Court by certiorari, is not before the court, yet the decision of the state court against the validity of the attorneys’ fee statute is an independent co-ordinate question which should be reviewed by this Court, and if this Court should be of the opinion that the Supreme Court of the State of Mississippi was wrong in its decision, would entitle plaintiffs in error to a reversal of the case.

In the case of *Lawrence P. Mills v. W. B. Green* 159 U. S. 651, 40 L. Ed. 293, this Court decided that if a federal question should be presented by the record and the court should be of the opinion that its determination in favor of plaintiffs in error would entitle plaintiffs in error to no relief at its hands, then such question was not an open and substantial question but a moot question and that the court would not use such question as a basis for assuming jurisdiction. The Court used in that case the following language:

“We are of opinion that the appeal must be dismissed upon this ground, without considering

any other question appearing on the record or discussed by counsel.

“The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal.”

Assuming now, as we have the right to assume under this branch of the argument, that the Court is without authority to pass upon the federal questions decided by the state court involving a construction of section 3477 of Revised statutes of the United States, wherein plaintiffs in error complain that a right privilege or immunity asserted by them under a federal statute was, by a decree of the state court, decided adverse to such assertion, then we affirm that for the court to proceed to determine the correctness or incorrectness of the decision of the Supreme Court of the State of Mississippi in respect to the validity of the attorneys' fee statute would be merely to decide a **moot** question. In other words assuming now, and for the sake of argument we have the right to assume, that this Court could not review the assignment of plaintiffs in error in respect to the applicability of section 3477, the Court could grant plaintiffs in error no relief even if it should decide that the Supreme Court of the State of Mississippi was wrong in deciding that the attorneys fee provision in the act of Congress making appropriations for war claims

was wrong; for the reason that under the decision of the Supreme Court of the State of Mississippi the entire fund was awarded to the heirs and personal representatives of R. M. Lay, and as to them the validity or invalidity of the attorneys fee statute is no longer an open question.

In our original statement of facts in this case, it was stated that the heirs at law of R. M. Lay, defendants in error, invited the Supreme Court of the State of Mississippi to award to Messrs. King & King a sufficient amount to make up their total contractual fee of 50% of the amount collected. At the instance of counsel for plaintiffs in error, we have consented to a correction of this statement. The record does not show that the heirs and personal representatives of R. M. Lay invited the court to allow the entire fee of 50%. But the record does show that the heirs and personal representatives of R. M. Lay nowhere in the record made any kind of objection to the fee contract of King & King, and the record further shows that the judgment of the Supreme Court of the State of Mississippi awarded to Messrs. King & King the balance of the fee, and that from the decree no appeal has been taken by the defendants in error, and that as to the heirs and personal representatives of R. M. Lay and Messrs. King & King, the controversy has been closed by the solemn adjudication of the Supreme Court of the State of Mississippi, and now as between the parties is "*res adjudicata*." Therefore the Court finds the record in the following condition. The entire fund forming the subject matter of the litigation has been awarded to the heirs and personal representatives of R. M. Lay by the decree of the Supreme Court of the State of Mississippi; irrespective of the correctness or incorrectness of this decree in holding that section 3477 of the revised statute does not prevent the heirs and personal representatives of R. M. Lay from taking the entire fund after paying attorneys fees, this Court is powerless to review and correct the same because the claim of

plaintiffs in error to the fund amounted to the assertion of a right under the federal statute which was denied them and which can only be reviewed in this Court by certiorari. This being true, that part of the decree of the Supreme Court of the State of Mississippi awarding the entire fund to those defendants in error who are heirs at law and personal representatives of R. M. Lay, can not be reviewed by this Court. It necessarily follows that the question of the constitutionality of the attorneys fee provision is a **moot** question and not an open one in this Court. To illustrate the question, suppose the Court should decide that the Supreme Court of the State of Mississippi was wrong in holding that the provision was invalid and unconstitutional and hold that King & King were only entitled to a fee of 20% which was paid them in the beginning. The effect of the decision would be as against King & King to give to the heirs and personal representatives of R. M. Lay the remaining 30%, although there is now in force and in full effect the solemn decree of the Supreme Court of the State of Mississippi as between such defendants and King & King that the entire fee of 50% should be paid. Not only that, but although the court might decide that the Supreme Court of the State of Mississippi was wrong in declaring unconstitutional the Act of Congress limiting attorneys fees to 20% of the amount recovered, yet it could afford plaintiffs in error absolutely no relief whatsoever for the very obvious reason that it is powerless to review that portion of the decree awarding the entire fund to the heirs and personal representatives of R. M. Lay. It necessarily follows that if our position is correct, this Court cannot review the decree of the Supreme Court of the State of Mississippi in respect to the right asserted by plaintiffs in error to the entire fund under section 3477 of the revised statutes because of the lack of certiorari and although the Supreme Court of the State of Mississippi committed error in awarding the fund to the heirs and personal representatives of R. M.

Lay, yet the question as to the constitutionality of the Act of Congress limiting attorneys fees is not an open question, not a substantial question, and even if decided in favor of plaintiffs in error this Court could award them no relief in respect thereto.

FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

There is a suggestion contained in brief of plaintiffs in error to the effect that the decree of the Supreme Court of the State of Mississippi was against the validity of the judgment recovered by R. M. Lay, administrator of the estate of Nancy Lay, deceased, v. The United States, in the Court of Claims at Washington, D. C. We respectfully submit that this position is without merit. The validity of the judgment in question was never brought in issue in the present case. As a matter of fact, before the litigation giving rise to this controversy was instituted, the judgment of R. M. Lay, Administrator, had been rendered and fully paid and satisfied. Not only was there no decision against its validity, but the fact that it was valid was assumed by the State Court. The judgment in favor of R. M. Lay, administrator of the estate of Nancy Lay, deceased, was merely a money judgment which provided that the administrator of the estate of Nancy Lay should have and recover a certain amount of money from the United States. It involved no other issues and the decree sought to be reviewed in no manner was against the validity thereof. Upon the other hand, as above stated, its validity was assumed since Congress made an appropriation to pay the judgment and it had been fully paid and satisfied. The Supreme Court of the State of Mississippi decided nothing in respect to the validity of the judgment in the Court of Claims. It merely decided that, after the collection of the judgment by the administrator, when it came to the distribution of the fund by the chancery

court of Scott County, Miss., the heirs at law of R. C. Lay had superior equities in reference to the fund. This however, was a matter arising in the state court in the course of the administration of the estate of Nancy Lay; having no reference whatever to the validity or invalidity of the judgment in the Court of Claims. The judgment in the Court of Claims of *R. M. Lay, Administrator v. The United States*, did not attempt to adjudicate or settle the conflicting claims of the various members of the Lay family as to the fund. No pleadings were formed which presented any issue such as arose in this case in administering the estate of Nancy Lay in the chancery court of Scott County, Mississippi. It is one thing for the Court to say that in the distribution of the estate of Nancy Lay in the State Court, the Court would give force to certain equities existing in favor of the heirs and personal representatives of R. C. Lay. To declare invalid the judgment in the Court of Claims in which the estate of Nancy Lay and the United States were parties, is a very different proposition. It was not within the province of the Court of Claims to pass on and settle such conflict as might arise in the course of the administration of the estate of Nancy Lay. The decree sought to be reviewed in this Court was a final decree in the administration of the estate of Nancy Lay settling conflicting claims in respect to the distribution of her estate. The Court in rendering the decree did not declare invalid the judgment of the Court of Claims, but proceeded to a final decree upon the assumption that the judgment in the Court of Claims was in all respects valid.

At the utmost, and to state the case most strongly for plaintiffs in error, their contention simply amounts to the assertion of a right, privilege or immunity under a federal authority. See *Crescent City Live Stock Co. v. Butchers' Union etc.*, 120 U. S. 141, 30 L. Ed., 614. In other words, the contention of plaintiffs in error in its last analysis amounts to the assertion by plaintiffs in er-

ror of the right to the fund by reason of the judgment in the Court of Claims, the assertion of which right, privilege or immunity under the statute can only be reviewed by certiorari as herein before pointed out. The judgment in the Court of Claims was no adjudication of the respective rights to the fund involved and can not be said to be "**res adjudicata**" because the Court of Claims would have had no jurisdiction to settle any such conflict even if the issue involved had presented the same.

ESTOPPEL.

Counsel for plaintiffs in error presented to this Court the authorities in support of the contention that R. M. Lay, Administrator of the estate of Nancy Lay, deceased, having collected the fund as administrator of the estate and in a fiduciary capacity, is estopped to set up any adverse claim thereto. The Supreme Court of the State of Mississippi in this case decided that there was no estoppel, as will appear by reference to the opinion. It is universally held that questions of waiver and estoppel form a part of the local law of the state and present no federal question. The following authorities are directly in point and sud sufficiently dispose of the contention.

Parker v. McLean, 237 U. S. 469, 59 L. Ed., 1051;

Pittsburgh & Lake Angeline Iron Co. v. Cleveland Iron Mining Co., 178 U. S. 270, 44 L. Ed., 1065;

Bruno Beaupre v. Noyes, 138 U. S. 397, 34 L. Ed., 991;

Carothers v. Mayer et al., 164 U. S. 325, 41 L. Ed., 453;

Israel v. Arthur 152 U. S. 355, 38 L. Ed., 474;

State of Mich. v. R. R. Co., 152 U. S. 363, 38 L. Ed., 478;

Gillis v. Stinchfield, 159 U. S. 658, 40 L. Ed., 295;
Sherman v. Grinnell, 144 U. S. 198, 36 L. Ed., 403;
Weyerhauser v. State of Minn., 176 U. S. 550, 44 L. Ed., 583.

POINT II.

Under point 3 in our original brief we announced the following propositions:

“The United States having fully paid and discharged the claim had against it by the estate of Nancy Lay, deceased, and such fund having been paid and delivered to the custody of the Chancery Court of Scott County, Mississippi, and all liability against the United States by reason of such claim having become extinguished, Section 3477 of the Revised Statutes of the United States, being Section 6383 of the Compiled Statutes, Ann., was without application, and the Supreme Court of the State of Mississippi had the right, having the exclusive control and jurisdiction of such fund, to direct its distribution and application in accordance with what it determined to be the strongest equities.”

Counsel for plaintiffs in error cite in support of the contention the following cases: Spofford v. Kirk, 97 U. S. 484. This case falls exactly within the distinction we have endeavored to keep in mind throughout our brief. In other words, in that case the United States had not secured its release from liability. This Court in the case of Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229, differentiated the case of Spofford v. Kirk, in the following language:

“And it is understood that the Circuit Court

sustained the demurrer in this case under pressure of the strong language of the Court in *Spofford v. Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. These mischiefs, as laid down in that opinion, and in the others referred to, were mainly two."

Counsel for plaintiffs in error also cite the case of *United States v. Gillis* 95 U. S. 407, 24 L. Ed. 503. In that case the United States had not divested itself of financial interest in the controversy. Upon the other hand the United States Government still had the money in its possession and under its control and the assignee resorted to the courts for the purpose of recovering the money from the United States. In such case the statute applies with all its force and vigor and falls within the distinction which we have endeavored to preserve. Counsel for plaintiffs in error also cite the case of *Nutt v. Nutt* 200 U. S. p. 12, 50 L. Ed. p. 248. Strange to say, in that case the point now under discussion, that the Mississippi court had the right to distribute the fund, was not discussed, but the Supreme Court of the State of Mississippi in that case unnecessarily undertook to decide a federal question and to construe a federal statute, and this Court thought its construction of the statute was erroneous. In the present instance an entirely different question is presented. The case of *Nutt v. Nutt*, however, was modified by the case of *McGowan v. Parish* 237, U. S. 285, 59 L. Ed. 955. The Court held that the contract construed in the case of *Nutt v. Nutt*, created a lien upon the fund which this Court held was in violation of the statute. The case of *National Bank of Commerce v. Downie*, 218 U. S. 345, 54 L. Ed., 1065, is cited

by counsel for plaintiffs in error. This case also falls within the distinction we have endeavored to make plain.

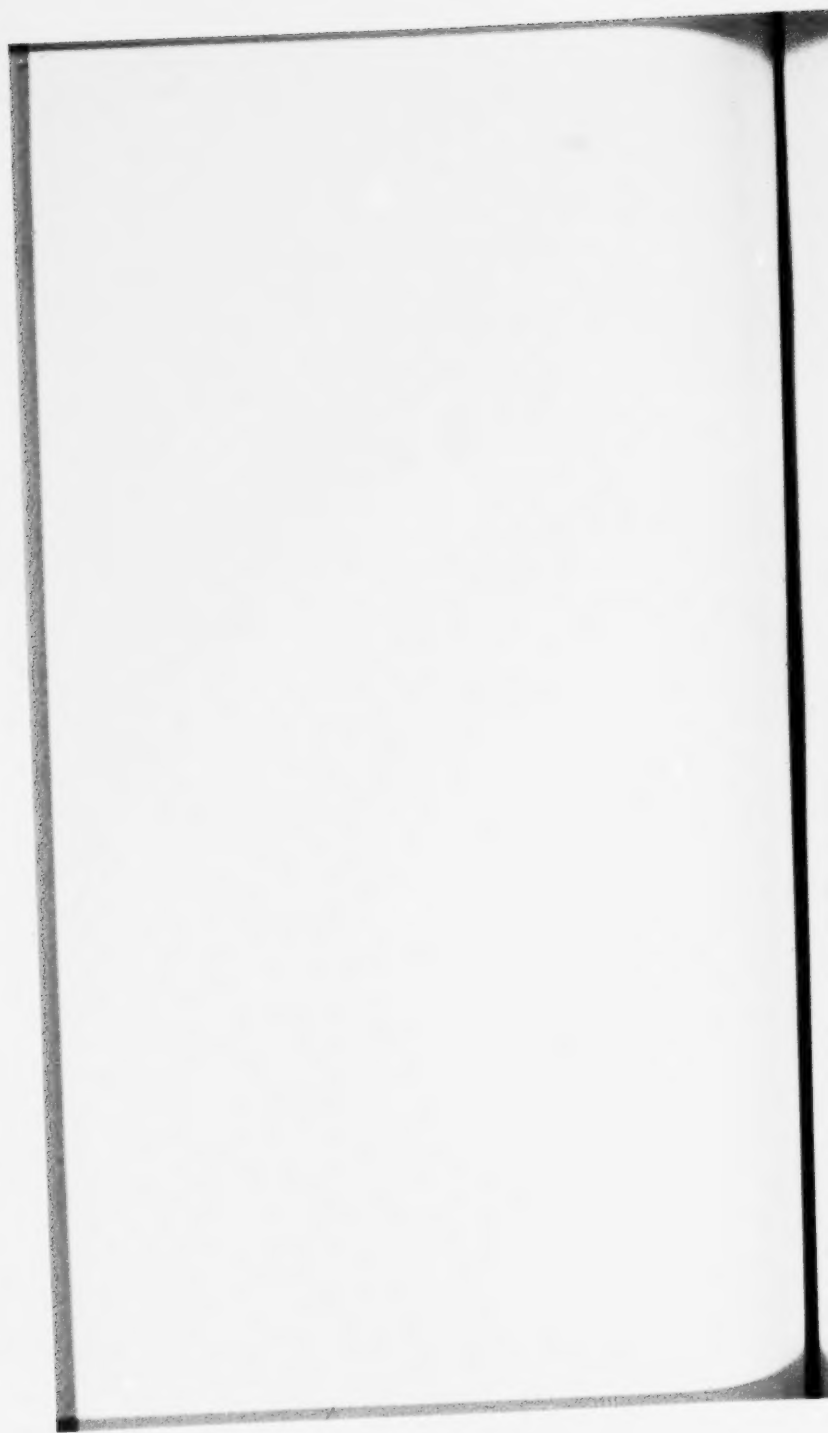
In that case, two banks advanced money to a public contractor, taking as collateral security assignment of the funds coming to the contractor from the United States Government. Before the fund was paid to the contractor, he went into bankruptcy, and the respective banks, prior to the time that the United States paid the money into court, sought an adjudication that they were entitled to have a preference against the other creditors to the extent of the assignment held by them. The United States had not divested itself of its interest in the premises; upon the other hand, still had in its possession the funds. Therefore the case is no authority against the position which we have taken; on the contrary, it is directly in line with the distinctions which we have endeavored to draw.

We have cited a large number of cases holding that where the United States has divested itself of all interest in the fund, that Section 3477 of the Revised Statutes is not applicable. The cases cited by counsel for plaintiffs in error are not in point, as they were all cases where the Government had not obtained an extinguishment of its liability, which is the essential point of distinction. In the case of *Nutt v. Nutt*, this point was not presented or discussed, and the decision of the Supreme Court of the State of Mississippi was affirmed on other grounds.

We respectfully submit that the motions should be sustained.

W. H. WATKINS,

Attorney for Defendants in Error, on Motions.



SUPREME COURT OF THE UNITED STATES.

No. 633.—OCTOBER TERM, 1918.

F. Lay *et al.*, Plaintiff in Error, }
 vs. } In Error to the Supreme Court
R. C. Lay *et al.* } of the State of Mississippi.

[November 18, 1918.]

On motion to dismiss or affirm.

Memorandum for the Court by the CHIEF JUSTICE.

The right to a fund resulting from the payment of an appropriation by Congress to satisfy a judgment for the value of property taken during the Civil War is the issue here involved. The contestants are the heirs at law of the original claimant and persons holding under an assignment by her of all her right to the claim fund. The court enforced the assignment.

Under the assumption that the claimant was prohibited by the law of the United States (sec. ~~8744~~, Rev. Stats.) from making an assignment, the heirs at law prosecute error to correct the Federal error thus assumed to have been committed. But the assumption indulged in as to the effect of the law of the United States is without merit. *McGowan v. Parish*, 237 U. S. 285, 294, and cases cited. This renders it unnecessary to consider whether, if the heirs at law were entitled to the fund, they would be liable to pay the full sum of the attorney's fee contracted for by the transferee and the duty of pay which the transferee and those in privity do not dispute.

Judgment affirmed.

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